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9

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 B.B., a minor by and through her
13 mother, CHELSEA BOYLE; and
CHELSEA BOYLE, an individual,

14
15 Plaintiff,

16 vs.

17 CAPISTRANO UNIFIED SCHOOL
18 DISTRICT, et al.

19 Defendant.
20

CASE NO. 8:23-cv-00306-DOC-ADS

Assigned for All Purposes to:
Hon. David O. Carter – Courtroom 10A

**DEFENDANTS' CAPISTRANO
UNIFIED SCHOOL DISTRICT,
JESUS BECERRA, AND CLEO
VICTA'S MEMORANDUM OF
CONTENTIONS OF FACT AND
LAW**

Date: February 13, 2024
Time: 8:30 a.m.
Dept.: 10A

Trial Date: March 12, 2024

Complaint filed: February 21, 2023

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1 I. FACTUAL CONTENTIONS

2 A. The March 2021 Incident

3 In March 2021, Plaintiff made a drawing with the words, “Black Lives
4 Mater” and “any life” and gave it to a friend. At the time Plaintiff made this
5 drawing, Plaintiff and the other student were first grade students. This drawing was
6 not part of the curriculum, instruction, nor any education plan; it was made entirely
7 on Plaintiff’s own accord. Plaintiff gave the drawing to a classmate, M.C. who took
8 it home. The drawing was discovered in M.C.’s backpack by her mother, Cathy
9 Clay (“Clay”) who emailed Jesus Becerra (“Becerra”) stating she would not tolerate
10 her daughter receiving messages based on her skin color and asked him to address
11 the issue. The following day, Becerra called Clay to gather more information.
12 Becerra thereafter spoke with Plaintiff about the drawing in his office for a quick
13 conversation, thanked her for explaining the drawing to him, and sent her away.
14 Becerra did not call Plaintiff’s drawing racist, inappropriate, tell her to apologize, or
15 bench her from recess. Becerra also called Plaintiff’s mother, Chelsea Boyle
16 (“Boyle”), to inform her about the drawing in a light-hearted conversation. No
17 documentation of the situation was kept as it was not perceived by anyone to be
18 anything of merit. Until March 8, 2022, that was the end of the story.

19 On March 8, 2022, after a terse text exchange with M.C.’s mother, Plaintiff’s
20 mother claims she learned of the drawing for the first time. Plaintiff’s mother then
21 interrogated Plaintiff about events which occurred 11 months earlier.

22 Given the passage of time, it is not unreasonable that Plaintiff’s version of
23 events is dramatically different than Becerra’s. Plaintiff claims Becerra approached
24 her on the playground under “the big tree” and pulled her aside for the duration of
25 recess, approximately 15 minutes, to discuss the drawing. Plaintiff claims Becerra
26 reprimanded her, called her racist, called the drawing inappropriate, instructed her
27 not to draw pictures for her friends at school or express her belief that all lives have
28 equal worth. Plaintiff’s version claims Becerra told her she had to apologize to M.C.

1 for the drawing and that she was benched from recess for two weeks. Plaintiff
2 originally claimed she apologized in front of 150 staff and students.

3 After Plaintiff's mother's complaint on March 8, 2022, the District conducted
4 a thorough investigation, consisting of three different levels, each time determining
5 Plaintiff's mother's claim was unsubstantiated. Without filing a Tort Claim, Plaintiff
6 then filed this lawsuit giving her the opportunity to conduct further discovery to
7 substantiate her claims, yet they remain unsupported.

8 In fact, what did come to light in discovery was that many of Plaintiff's
9 allegations were completely false. Not a single witness saw Becerra talk to Plaintiff
10 for an entire recess; she did not apologize in front of 150 staff and students; Plaintiff
11 apologized to M.C. alone without Becerra, or anyone else present; Becerra did not
12 tell Plaintiff she was benched for two weeks. Plaintiff claims she was told by two
13 teachers she was benched from recess, however, neither told her why she was
14 required to miss recess, no teacher or supervisor enforced her missing recess, and
15 this "benching" was not documented in Plaintiff's discipline file even though other
16 instances of her missing recess were documented.

17 Despite Plaintiff's version of events, discovery has turned up zero evidence to
18 support these allegations. Plaintiff has identified zero witnesses, nor is there any
19 evidence to corroborate her story despite the alleged public nature of what occurred.

20 **B. The August 23, 2022 Incident**

21 During the summer of 2022, Plaintiff's mother filed her Tort Claim with the
22 District and appeared on multiple national cable stations to share the story of
23 Plaintiff and Becerra. Plaintiff and her brother did not find out about this until mid-
24 August 2023 when other students told them on the first day of school that Plaintiff's
25 mother had been on television.

26 On August 23, 2022, almost 18 months after the drawing, Plaintiff's brother,
27 K.B., was upset, would not go back to class, and there was a concern for his safety
28 and that he may attempt to elope from campus. Victa, a school counselor who was

1 not working at the school at the time of the March 31, 2021 incident, was asked by
 2 Becerra to come outside and help with the situation. While Victa and Becerra were
 3 ensuring K.B. did not elope from campus, Plaintiff came out of her class. Upon
 4 seeing her brother upset, Plaintiff tried to comfort and speak to him before K.B.
 5 pushed Plaintiff away. After seeing Plaintiff get pushed by her brother, Victa was
 6 concerned for Plaintiff's well-being. In fact, Plaintiff was so concerned about her
 7 brother's state, that she went into the bathroom to call her mother. Plaintiff alleges
 8 that Victa followed her into the bathroom but there is no evidence to substantiate
 9 that allegation.

10 Most importantly, during this entire situation, neither the drawing from
 11 almost 18 months prior nor the ongoing investigations was brought up by Victa.
 12 Moreover, Becerra was supervising the situation from afar. Neither Victa nor
 13 Becerra took any actions toward Plaintiff that give rise to a cause of action. In fact,
 14 one might question Victa and Becerra's response to this situation if they chose to not
 15 act while knowing a student was wandering campus not in class and after witnessing
 16 a young girl get shoved by her older brother. Ultimately, Plaintiff has no evidence
 17 to support her unsubstantiated allegations against Defendants.

18 Defendants filed an Answer denying all material allegations and asserted
 19 numerous affirmative defenses.

20 **II. LEGAL CONTENTIONS: CLAIMS AND DEFENSES**

21 **A. Plaintiff's Claims**

22 Plaintiff's operative Third Amended Complaint brought five causes of action:

- 23 • Claim 1: Violation of First Amendment Rights under 42 *U.S.C.* § 1983
 24 under *Tinker* against Becerra (This claim was dismissed against CUSD;
 25 See Dkt. No. 69)
- 26 • Claim 2: Violation of Fourteenth Amendment Rights under 42 *U.S.C.* §
 27 1983 against Becerra and the District (This claim was dismissed in its
 28 entirety; See Dkt. No. 69)

- Claim 3: Intentional Infliction of Emotional Distress Against Becerra and Victa
- Claim 4: Negligent Hiring/Supervision/Retention Against the District
- Claim 5: Retaliatory Harassment for Violation of Plaintiff's First Amendment Rights under 42 *U.S.C.* § 1983 against Becerra and Victa (This claim was dismissed against CUSD; See Dkt. No. 69)

B. Elements Required to Establish Plaintiff's Claims

Claim 1: Plaintiff's First Amendment Claim Under *Tinker*

1. Plaintiff B.B.'s speech did not forecast substantial disruption of school activities;
2. Plaintiff B.B.'s speech did not forecast material interference of school activities; or
3. Plaintiff B.B.'s speech did not invade the rights of others.

See Ninth Circuit Manual of Model Civil Jury Instructions § 9.11, Comments (2023); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969); *see also Waln v. Dysart School District*, 54 F.4th 1152, 1161-63 (9th Cir. 2022); *Dariano v. Morgan Hill Unified School Dist.*, 767 F.3d 764, 776 (separate opinion).

Claim 2: Plaintiff's Fourteenth Amendment Claim

Because this claim was dismissed in its entirety, Defendants do not brief it in this Memorandum.

Claim 3: Intentional Infliction of Emotional Distress

1. That Defendants Becerra and Victa's conduct was outrageous;
2. That Defendants Becerra and Victa intended to cause Plaintiff B.B. emotional distress; or
3. That Defendants Becerra and Victa acted with reckless disregard of the probability that Plaintiff B.B. would suffer emotional distress, knowing that Plaintiff B.B. was present when the conduct occurred;

1 4. That Plaintiff B.B. suffered severe emotional distress; and

2 5. That Defendants Becerra and Victa's conduct was a substantial factor in
3 causing Plaintiff B.B.'s severe emotional distress.

4 See Judicial Council of California Civil Jury Instructions § 1600.

5 Claim 4: Negligent Hiring, Supervision and/or Retention of Employees Victa and
6 Becerra

7 1. That Capistrano Unified School District hired Becerra and Victa;

8 2. That Becerra and Victa was/became unfit or incompetent to perform the work
9 which they were hired.

10 3. That Capistrano Unified School District knew or should have known that
11 Becerra and Victa was/became unfit or incompetent and this unfitness or
12 incompetence created a particular risk to others;

13 4. That Becerra and Victa's unfitness or incompetence harmed Plaintiff B.B.;
14 and

15 5. That Capistrano Unified School District's negligence in hiring, supervising,
16 or retaining Becerra and Victa was a substantial factor in causing Plaintiff
17 B.B.'s harm.

18 See Judicial Council of California Civil Jury Instructions § 426.

19 Claim 5: Plaintiff's First Amendment Retaliatory Harassment

20 To establish the Defendants deprived the plaintiff of this First Amendment
21 right, the plaintiff must prove the following additional elements by a preponderance
22 of the evidence:

23 1. The Plaintiff was engaged in a constitutionally protected activity;

24 2. The defendants' actions against the plaintiff would chill a person of ordinary
25 firmness from continuing to engage in the protected activity; and

26 3. The plaintiff's protected activity was a substantial or motivating factor in the
27 defendants' conduct.

28 4. If the plaintiff established each of the foregoing elements, the burden shifts to

1 the defendant to prove by a preponderance of the evidence that the defendant
 2 would have taken the action(s) in question, even in the absence of any motive
 3 to retaliate against the plaintiff.

4 *See Ninth Circuit Manual of Model Civil Jury Instructions § 9.11 (2023).*

5 **C. Key Evidence in Support of Plaintiff's Claims**

6 Claim 1: Plaintiff's First Amendment Claim Under *Tinker*

7 Plaintiff must prove that her drawing did not cause circumstances which
 8 might reasonably have led school authorities to forecast substantial disruption of or
 9 material interference of school activities or invade the rights of other students.

10 *Tinker, supra*, 393 U.S. at 514; *Pinard v. Clatskanie School Dist.* 6J, 467 F.3d 755,
 11 766 (9th Cir. 2006).

12 Plaintiff claims there was no substantial disruption or material interference of
 13 school activities or invasion of the rights of others. However, the email from Clay to
 14 Becerra indicates Clay would not tolerate her daughter, M.C., receiving messages
 15 based on race. In an effort to protect the rights of M.C. and avoid a substantial
 16 disruption or material interference of her educational experience, Becerra spoke to
 17 Plaintiff about the drawing. Clay's testimony will show she was concerned about
 18 her daughter's rights, a first-grade student, and did not want her exposed to political
 19 statements of the like contained in the drawing. Accordingly, Becerra followed up
 20 with Plaintiff to placate Clay's concerns which were resolved.

21 Moreover, evidence shows that this incident was not documented in
 22 Plaintiff's Discipline File, despite other documentation of events before and after the
 23 incident. Defendants will also point to Becerra's email exchanges with Plaintiff's
 24 mother in March 2022 that convey Plaintiff's version of events never occurred.

25 Claim 3: Intentional Infliction of Emotional Distress

26 Here, Plaintiff has no evidence to support her claims against Becerra for the
 27 March 2021 incident. The evidence, including testimony from Becerra, will show
 28 that his conduct of briefly speaking to Plaintiff about her drawing was not extreme

1 or outrageous as defined by the statute. Becerra did not tell Plaintiff she had to sit
 2 out from recess. Becerra did not pull her aside at recess or demand a public apology
 3 for her drawing. In fact, her disciplinary file shows no documentation of any
 4 purported punishment.

5 With respect to the August 23, 2022 incident, Becerra's conduct does not
 6 amount to extreme or outrageous conduct. During this interaction, Becerra was
 7 standing from afar supervising the situation and took no action toward Plaintiff.
 8 Therefore, Plaintiff cannot establish the threshold element of "conduct" taken
 9 toward her, let alone that it was extreme or outrageous. Evidence shows that Becerra
 10 did not speak to Plaintiff during this interaction where there was a concern for
 11 student safety.

12 Likewise, Victa was addressing a student safety concern. The evidence will
 13 show that she was concerned about Plaintiff's brother eloping from class as he
 14 refused to go back to class. Victa spoke nicely to Plaintiff, and after observing her
 15 brother push her away, was checking in on her to make sure she was okay. Victa did
 16 not walk into the bathroom after Plaintiff or obstruct her exit. There is no evidence
 17 to support such allegations. The evidence shows that Plaintiff cannot establish any
 18 element of her IIED claim against Becerra or Victa.

19 Moreover, Plaintiff has zero evidence that she suffered emotional distress
 20 related to these incidents.

21 Claim 4: Negligent Hiring, Retention, Supervision

22 Plaintiff has zero evidence to support negligent hiring. Both Victa and
 23 Becerra are long-time employees of the District and Plaintiff can point to no
 24 evidence to support they were negligently hired. The District will point to the fact
 25 that Becerra and Victa were fulfilling their duties as public employees at all times
 26 and did not breach any duty owed to Plaintiff. Their actions, as articulated above
 27 were measured, justified, and in concern for student rights and safety. There is no
 28 evidence that Becerra or Victa posed a risk to other students such that the District

1 knew or should have known that they posed such a risk.

2 Claim 5: Retaliatory Harassment

3 Related to the March 2021 incident, Becerra had a brief conversation with
 4 Plaintiff and sent her away. He did not reprimand her, call her or the drawing racist,
 5 inappropriate, bench her from recess, or condemn her in public in front of peers and
 6 staff. His actions were in response to a concerned parent, and he handled the
 7 situation appropriately. Further, Becerra would have taken these same actions in the
 8 absence of the protected conduct; i.e. speaking to the student, sending them away,
 9 not documenting the exchange, not punishing them, not taking away recess, etc.

10 Again, for the August 23, 2022 incident, Plaintiff was not engaged in a
 11 constitutionally protected activity at that time. Further, Becerra was standing far
 12 away from Plaintiff, never spoke to Plaintiff, and directed no conduct toward
 13 Plaintiff.

14 Victa was not even employed at the elementary school at the time the drawing
 15 incident occurred. The evidence shows that during this incident, almost 18 months
 16 after the underlying drawing incident, she did not mention the drawing to Plaintiff,
 17 was nice to Plaintiff, and was concerned about students safety and Plaintiff's well-
 18 being after observing her brother shove her. Moreover, Plaintiff was not engaged in
 19 a constitutionally protected activity at this time.

20 **D. Affirmative Defenses**

21 First Affirmative Defense

22 Plaintiff's constitutional claims against Becerra and Victa are barred by the
 23 doctrine of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
 24 *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

25 Second Affirmative Defense

26 Plaintiff's state law claims against all Defendants are barred by failure to
 27 comply with Tort Claim Requirements. *See Cal. Gov't Code* §§ 910, 911.2, 945.4,
 28 950.2 and 950.6; *Munoz v. State of California*, 33 Cal.App.4th 1767, 1776 (1995);

1 *See Del Real v. City of Riverside*, 95 Cal.App.4th 761, 767 (2002).

2 Third Affirmative Defense

3 Plaintiff's state law claims against Becerra and Victa are barred by
4 discretionary immunity under *Gov't Code* § 820.2. *See Gov't Code* § 820.2; *Doe By*
5 *and Through Doe v. Petaluma City School Dist.*, 830 F.Supp.1560, 1583.

6 **E. Elements Required to Establish Defendants' Affirmative Defenses**

7 First Affirmative Defense

8 1. First, the court must decide whether the facts make out a violation of a
9 constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)
10 (citations omitted).

11 2. Second, the court must decide whether the right at issue was "clearly
12 established" at the time of defendant's alleged misconduct. *Id.*

13 Second Affirmative Defense

14 1. Plaintiff submitted a Tort Claim with the public entity. *Gov't Code* § 945.4.

15 2. The Claim shall be presented by the claimant and shall include many things,
16 (a) the name of the claimant; and

17 (d) A general description of the injury. *Gov't Code* § 910.

18 3. One claimant cannot rely on another claimant's Tort Claim. *Castaneda v.*
19 *Dept. of Corrections & Rehabilitation*, 212 Cal.App.4th 1051, 1062 (2013).

20 Third Affirmative Defense

21 1. The Defendant's alleged acts and omissions were discretionary acts. *Gov't*
22 *Code* § 820.2; *Kemmerer v. County of Fresno*, 200 Cal.App.3d 1426.

23 2. A discretionary act is one which requires the exercise of judgment or choice;
24 or equitable decision of what is just and proper under the circumstances. *Tietz*
25 *v. Los Angeles Unified School Dist.*, 238 Cal.App.2d 905; *Kemmerer v.*
26 *County of Fresno*, 200 Cal.App.3d 1426.

27 **F. Key Evidence in Support of Defendants' Affirmative Defenses**

28 First Affirmative Defense

1 and overseeing safety concerns, of the school are discretionary decisions protected
2 by immunity.

3 **G. Statements of Third Parties**

4 Defendants are not aware of any third parties.

5 **H. Anticipated Evidentiary Issues**

6 Defendants anticipate Plaintiff will attempt to introduce a myriad of
7 objectionable evidence consisting of irrelevance, hearsay, prejudice, and character
8 evidence.

9 **I. Anticipated Legal Issues**

10 None anticipated.

11 **III. BIFURCATION OF ISSUES**

12 None anticipated.

13 **IV. JURY TRIAL**

14 Defendants believe this case is triable to a jury and the parties have made a
15 timely demand for a jury trial.

16 **V. ATTORNEYS' FEES**

17 If Plaintiff prevails on her 42 *U.S.C.* § 1983 claims, she would be entitled to
18 reasonable attorneys' fees related to those claims.

19 **VI. ABANDONMENT OF ISSUES**

20 Defendants are not aware of any abandoned issues.

21
22 DATED: February 13, 2024

HYLTON & ASSOCIATES
A Professional Corporation

23
24
25 By:



26 **COURTNEY L. HYLTON**
27 **BRENDAN M. GARDINER**
28 **LADAN SHELECHI**

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UNIFIED SCHOOL DISTRICT; JESUS
BEERRA; and CLEO VICTA

Case Name: *B.B., et al. v. Capistrano Unified School Dist., et al.*
Case No.: 8:23-cv-00306-DOC-ADS

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 18201 Von Karman Avenue, Suite #430, Irvine, CA 92612.

On **February 13, 2024**, I served the foregoing document(s) described as **DEFENDANTS' CAPISTRANO UNIFIED SCHOOL DISTRICT, JESUS BECERRA, AND CLEO VICTA'S MEMORANDUM OF CONTENTIONS OF FACT AND LAW** on the interested parties by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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☐ **BY MAIL:** As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, I deposited such envelope in the mail at Irvine, California.

☐ **BY FACSIMILE:** I caused all of the pages of the above-entitled document to be sent to the recipient(s) noted via facsimile at the respective telephone numbers indicated above.

☒ **VIA ELECTRONIC MAIL (CM/ECF) -** all parties listed above have been served via electronic mail through the court's CM/ECF system, which automatically generates a Notice of Electronic Filing (NEF) allowing registered e-filers to retrieve the document.

☐ **BY FEDERAL EXPRESS/OVERNIGHT MAIL:** I caused the above-described document to be served on the interested parties noted as follows by Federal Express/Overnight Mail.

Case Name: ***B.B., et al. v. Capistrano Unified School Dist., et al.***

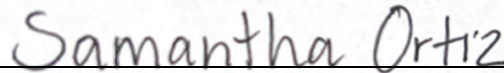
Case No.: 8:23-cv-00306-DOC-ADS



2 **BY PERSONAL SERVICE:** I caused such envelope to be delivered by
3 hand to the office(s) of the addressee via messenger.

4 I declare that I am employed in the office of a member of the bar of this court
5 at whose direction the service was made.

6 Executed on **February 13, 2024**, at Irvine, California.

7 

8 Samantha Ortiz
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